TRANSCRIPT OF RECORD.

160-293

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 650.

HENRY KOHL, APPELLANT,

vs.

HERMAN LEHLBACK, SHERIFF OF ESSEX COUNTY, NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED JUNE 21, 1895.

(15,940.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 20, 1895.

1 To the circuit court of the United States, district of New Jersey:

The petition of Henry Kohl, now a prisoner in the jail in the city of Newark, county of Essex, and State of New Jersey, of which county Herman Lehlbach is sheriff, respectfully represents as follows: That he was born in the city of Newark, New Jersey, United States of America, and is twenty-three years of age; that he is now unlawfully imprisoned, detained, and confined in said jail and restrained of his liberty; that the only pretext or cause of such imprisonment, detention, or restraint is by virtue of a judgment and sentence of the court of oyer and terminer and general jail delivery of the said county of Essex, New Jersey.

That in the month of December, 1894, he was indicted by the grand jury of Essex county for the crime of murder; that after the first day of January and before the 14th day of January, 1895, your petitioner entered a plea of not guilty to said indictment, subject to his right to object to said indictment; that before the commencement of the trial your petitioner, through his counsel, was permitted by the said court to object to the said indictment; whereupon his counsel moved to quash the indictment against him; which motion was denied, and an exception duly taken to the ruling of the court. The court thereupon directed the trial to proceed under said indictment.

That his trial under said indictment commenced on or about the 14th day of January, A. D. 1895, and ended on the 25th day
2 of January last past, by the jury in said cause rendering a verdict of murder in the first degree; that Samuel Ader, a juror on the jury that convicted your petitioner, is not and never was a citizen of the United States of America.

That on the 12th day of February last an application was made to said court of oyer and terminer for a new trial; a rule to show cause was granted and discharged on 14th February, 1895.

That deponent insists that he is entitled to have the discharge of said rule reviewed, with other proceedings, by virtue of an act of the legislature of 1894 of New Jersey, which permits a review of any decisions of any matter of discretion.

That on the twenty-first day of February, 1895, your petitioner was sentenced to be hung on the 21st day of March, 1895; that by the judgment and sentence of said court as aforesaid your petitioner has been and now is under sentence of death, and illegally and unlawfully restrained of his liberty and detained in said jail in violation of the Constitution and laws of the United States and in violation of the constitution and laws of the State of New Jersey, all of which guarantee to your petitioner the right to be informed of the nature of the crime for which he is to answer, and that he must not be held to answer a capital or otherwise infamous crime except upon an indictment or presentment by a grand jury.

That your petitioner was indicted for an offence which does not exist under the laws of New Jersey, the laws of New Jersey recog-

nizing no such crime as murder. The 68 section of the
3 crimes act (revision of the laws of New Jersey) has altered the common-law crime of murder by dividing it into two degrees—murder in the first degree and murder in the second degree.

That the indictment against your petitioner should have been laid under the statute and not under the common law, and should have been drawn with reference to the statutory crime, not the statutory form; that the said indictment is not drawn with reference to the statutory definition, but with reference to the common-law definition, which has been changed by the laws of New Jersey, and that under the rules of pleadings the statutory crime should have been set out distinctly in the indictment.

That on the twenty-seventh day of February his counsel made an application and argument for a writ of error to the chancellor of New Jersey; that said writ of error is, as your petitioner is informed by his counsel and verily believes, a writ of right and not a writ of grace; that an appeal has been duly taken from the order of the said chancellor to the court of errors and appeals, where such appeals are reviewable, and said appeal is now pending in said court of errors and appeals in the State of New Jersey.

That the said chancellor has denied said application; that a copy of said chancellor's order refusing writ of error, with a notice of appeal, has been duly served on the prosecutor of Essex county. Your petitioner is desirous of having the verdict rendered in his case and the validity of all questions that arose during his trial adjudicated upon by the higher courts of the State of New Jersey.

4 That your petitioner is advised by counsel and verily believes that his said conviction was and is illegal, and was and is in violation of the Constitution of the United States and the constitution and laws of New Jersey.

That before the commencement of said trial one of your petitioner's counsel objected to the indictment found against him.

That during the trial one of the petitioner's counsel made various requests to the judge who presided at said trial to charge said jury; all of which requests were denied by said judge, and said counsel duly excepted to the refusal of said judge to charge as requested, as appears by the stenographer's notes.

That said indictment does not charge your petitioner with the crime of murder of the first degree, and your petitioner maintains and asserts that under said indictment he has been illegally and unlawfully convicted of an offence for which he was not indicted, and in violation of the Constitution of the United States and the constitution of the State of New Jersey.

That on the sixth day of April last past your petitioner's counsel, in open court, in the said Essex over and terminer, in the presence of the prosecutor, presented a writ of error, signed by the clerk of the supreme court of New Jersey, sealed with the seal of said court, from the said supreme court to the said over and terminer;

that the said court would not allow the writ, but permitted it to be filed with the clerk of said court.

That said writ was presented under and by virtue of the act of 1881 of New Jersey.

That the said act is valid and effectual; that the act of 1878 of New Jersey made writs of error writs of right in all cases.

That it was not declared unconstitutional by the highest court of the State. The court simply held that there was an irregularity in the mode of procedure, in that that act provided that writs of error should go from the oyer and terminer to the court of errors and appeals instead of to the supreme court.

Your petitioner further says that the presiding judge of the said oyer and terminer court has instructed the clerk of Essex county, who is the clerk of said oyer and terminer, not to furnish your petitioner's counsel with a copy of the record and proceedings in this case; that the supreme court of New Jersey has refused your petitioner a stay of execution, and your petitioner has exhausted all remedies in the State court.

And your petitioner further shows that there is no other cause for his detention except as stated, and that his said conviction is unlawful for the following and other reasons:

1. Because he is indicted for an offence that is not a crime under the laws of New Jersey.

2. That murder, according to the statute of New Jersey, can be committed in various ways evincive of a wilful, deliberate, and premeditative killing, or in the perpetration of an independent crime which was not intended to accomplish the killing, but of which the killing was a mere unintendent incident.

3. That to meet the requirement of the Constitution of the United States the indictment should have charged in separate counts the killing within the alternative definition of the terms of the statute of New Jersey.

4. Because your petitioner has been denied by the State of New Jersey equal protection of its laws.

5. That the accused was convicted and has been sentenced to death as the result of a trial not founded upon and unpreceded by a sufficient indictment.

6. That your petitioner's said conviction was not only in violation of the laws of New Jersey, but was also in violation of the fourteenth amendment to the Constitution of the United States, in that his said trial and said conviction were not by due process of law.

7. Because your petitioner has been denied a review of the record and proceedings in his case pending appeal, which denial is in violation of the laws of New Jersey.

That under and by virtue of said judgment and sentence one Herman Lehlbach, sheriff of Essex county as aforesaid, threatens to carry out and execute said sentence of death upon your petitioner on the 16 of May, 1895, to which time your petitioner was reprieved.

Your petitioner further says that because the State courts of New Jersey have denied him rights which he is entitled to under the laws of that State that this tribunal should not hesitate in vindicating his rights and in redressing his wrongs.

In the language of Judge Swayne, speaking for the Supreme Court of the United States in Gilpeeke *vs.* Dubuque, 1 Wallace, 206,

7 "We shall never immolate truth, justice, and the law because a State tribunal has erected the alter and decreed the sacrifice."

Wherefore, to be relieved of said illegal and unlawful sentence, imprisonment, detention, and restraint, your petitioner prays that a writ of *habeas corpus may* be directed to the said Herman Lehlbach, sheriff as aforesaid, may issue in your petitioner's behalf, so that your petitioner may be forthwith brought into this court to do, submit to what the law may require, and that your petitioner may be discharged out of custody; and your petitioner will ever pray, &c.

J. HENRY KOHL.

UNITED STATES OF AMERICA, } ss.:
State of New Jersey, County of Essex, }

Henry Kohl, being duly sworn according to law, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has heard read the same and knows the contents thereof, and that the statements therein contained he believes to be true, and are true, to the best of his knowledge and belief.

J. HENRY KOHL.

Sworn and subscribed before me this ninth day of April, A. D. 1895, at Newark, New Jersey.

[L. S.] J. WHITEHEAD,
U. S. Comm'r, Dist. N. J.

Sworn to before me this 14th day of May, eighteen hundred and ninety-five.

[L. S.] WILLIAM E. BOVET,
Notary Public of New Jersey.

8 STATE OF NEW JERSEY, } ss.:
County of Essex, }

I, James T. Wrightson, clerk of the county of Essex and clerk of the circuit court and court of common pleas of said county, do hereby certify that said courts are courts of record; that William E. Bovet, whose name is subscribed to the annexed instrument, was at the time of taking the same a notary public in and for said county, duly commissioned and sworn and qualified to act as such; that I am well acquainted with the handwriting of such notary public, and verily believe his signature to the same is genuine.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of said courts and county, at Newark, this 11th day May, A. D. 1895.

WRIGHTSON, *Clerk.*

United States Supreme Court, U. S.

Endorsed: United States circuit court, district of New Jersey. Henry Kohl *vs.* Herman Lehlback. Petition and order refusing writ of *habeas corpus*.

The writ applied for is refused because, in my opinion, it appears from the petition that the petitioner is not entitled thereto.

EDW. T. GREEN, *J.*

Filed May 16, 1895.

S. D. OLIPHANT, *Clerk.*

9 United States Circuit Court, District of New Jersey.

In the Matter of HENRY KOHL, Petitioner, on Application for Writ of *Habeas Corpus*.

Notice of Appeal.

The petitioner in this cause hereby appeals from the final judgment of this court refusing the prayer of the petitioner to the next term of the Supreme Court.

Dated May 16, A. D. 1895.

THOMAS S. HENRY,
Att'y for Petitioner.

To clerk of the United States circuit court, district of New Jersey.

(Endorsed:) United States circuit court, district of New Jersey. Henry Kohl *vs.* Herman Lehlback. Notice of appeal. Filed May 16, 1895. S. D. Oliphant, clerk.

10 In the Circuit Court of the United States, District of New Jersey.

HENRY KOHL, Pl'ff and Appellant,
vs.
HERMAN LEHLBACK, Def't and Appellee.

The above-named plaintiff, Henry Kohl, considering himself aggrieved by the judgment entered on the 16 day of May, 1895, in the above-entitled proceedings, doth hereby appeal from said judgment to the Supreme Court of the United States, and he prays that this appeal be allowed and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

THOMAS S. HENRY,
Att'y for Pl'ff and Appellant.

And now, to wit, on the 16th day of May, A. D. 1895, the appeal is allowed as prayed for by and in pursuance of the statute in such case made and provided.

EDW. T. GREEN, *J.*

(Endorsed:) United States circuit court, district of New Jersey. Henry Kohl *vs.* Herman Lehlback. Petition and allowance of appeal. Filed May 16, 1895. S. D. Oliphant, clerk.

11 UNITED STATES OF AMERICA:

The President of the United States of America to Herman Lehlback, sheriff of Essex county, New Jersey, Greeting:

You are hereby cited and admonished to be and appear at — Supreme Court of the United States, to be holden at Washington, D. C., on the fourteenth day of June, 1895, pursuant to an appeal filed in the clerk's office of the United States circuit court of New Jersey wherein Henry Kohl is appellant and you are respondent, to show cause, if any there be, why the judgment rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Honorable Edward T. Green, one of the judges of the circuit court of the United States of America, the sixteenth day of May, eighteen hundred and ninety-five.

EDW. T. GREEN, *J.*

[Endorsed:] 8–280. United States circuit court, district of New Jersey. Henry Kohl *vs.* Herman Lehl*bach*. Citation. Filed May 20, 1895. S. D. Oliphant, clerk.

12 STATE OF NEW JERSEY, } *ss.:*
County of Essex, }

Augustine Karagan, being duly sworn according to law, on his oath says that he did, on Thursday, the 16th day of May, 1895, serve a copy of the annexed citation on Herman Lehlback, the sheriff of Essex county, New Jersey, at the county court-house in Newark, New Jersey, by delivering to and leaving said copy with him.

AUGUSTINE KARAGAN.

Sworn and subscribed before me at Newark, N. J., this 18 day of May, 1895.

[Seal of John Whitehead, U. S. Comm'r, District N. J.]

J. WHITEHEAD,
Commissioner of the Circuit Court of the United States in and for the District of N. J.

[Endorsed:] United States circuit court, district of New Jersey. Henry Kohl *vs.* Herman Lehlback. Affidavit of service. Filed May 20, 1895.

13 United States Supreme Court.

HENRY KOHL, Appellant,
vs.
HERMAN LEHLBACK.

Afterwards, to wit, on the sixteenth day of May, in the year eighteen hundred and ninety-five, before the justices of the Supreme Court of the United States, at the city of Washington, in the District of Columbia, comes the said Henry Kohl, by his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, in refusing to issue the writ of *habeas corpus* as prayed for.

Whereas by the law of the land the judgment ought to have been given for the plaintiff against the said defendant, and that the said plaintiff prays the judgment aforesaid may be reversed, amended, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

THOMAS S. HENRY,
Attorney for Plaintiff in Error.

(Endorsed:) United States circuit court, district of New Jersey. Henry Kohl *vs.* Herman Lehlback. Assignment of errors. Filed May 16, 1895. S. D. Oliphant, clerk.

14 UNITED STATES OF AMERICA, *District of New Jersey,* } *ss:*

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify that the foregoing is a full, true, and complete transcript of the record in the cause of Henry Kohl against Herman Lehlback, as the same appears on file and of record in my office.

The Seal of the U. S. Circuit Court, Dist. of New Jersey.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Trenton, in said district, this the eleventh day of June, A. D. 1895.

S. D. OLIPHANT, *Clerk.*

Endorsed on cover: Case No. 15,940. New Jersey C. C. U. S. Term No., 650. Henry Kohl, appellant, *vs.* Herman Lehlback, sheriff of Essex county, New Jersey. Filed June 21st, 1895.

Office Supreme Court, U. S.
FILED
NOV 11 1895
JAMES H. McKENNEY,
CLERK.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 650.

HENRY KOHL, PLAINTIFF AND APPELLANT,

vs.

HERMAN LEHLBACH, SHERIFF, &c., DEFENDANT AND APPELLEE.

ON APPEAL FROM UNITED STATES CIRCUIT COURT, DISTRICT OF NEW JERSEY.

To Henry Kohl, Appellant, and Thomas S. Henry, Attorney for Plaintiff and Appellant:

Take notice, that I shall apply to this Honorable Court, at the Court Rooms at Washington, D. C., on Monday, the eleventh day of November, A. D, 1895, at twelve o'clock, noon, of that day, or as soon thereafter as this Court can attend to the same, for an order to advance the above stated cause on the list, and to have an early day fixed for argument thereof.

ELVIN W. CRANE,

Attorney for Appellee and Prosecutor of the Pleas.

Dated October 29th, 1895.

Office Supreme Court, U. S.
FILED.
NOV 11 1895
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 650.

HENRY KOHL, PLAINTIFF AND APPELLANT,

vs.

HERMAN LEHLBACH, SHERIFF, &c., DEFENDANT AND APPELLEE.

ON APPEAL FROM UNITED STATES CIRCUIT COURT, DISTRICT OF NEW JERSEY.

Motion

~~NOTICE~~ TO ADVANCE.

On the sixth day of December, A. D., 1894, the appellant, was indicted by the Grand Jury of Essex County, in the State of New Jersey, for the crime of murder, committed in the city of Newark, in said county, on the sixteenth day of June, A. D., 1894. On the eleventh day of December, A. D., 1894, before the Court of Oyer and Terminer, held at the city of Newark, in and for said county of Essex, the appellant entered a plea of not guilty to said indictment, and the seventh day of January, A. D., 1895, was fixed for the trial of said indictment, and on said last mentioned day the trial was post-

poned to the fourteenth day of January, A. D., 1895. On said last mentioned day, and before the commencement of said trial, the appellant's counsel moved before said Court to quash the indictment, which motion was then and there denied, and an exception was taken and allowed to the ruling of said Court. The appellant was then tried before said Court and a jury, and found guilty of murder of the first degree, and was, on the twenty-first day of February, A. D., 1895, sentenced by said Court to be hanged on the twenty-first day of March, A. D., 1895.

That on the twenty-seventh day of February, A. D., 1895, his counsel applied to the Chancellor of the State of New Jersey for a Writ of Error, which application was, after due consideration, denied. The Governor of New Jersey, at the request of counsel for the appellant, granted three separate reprieves, whereby the time for the execution of said appellant was fixed for the twenty-fourth day of May, A. D., 1895, and on the sixteenth day of May, A. D., 1895, said appellant, by his counsel, Thomas S. Henry, filed in the office of the Clerk of the Circuit Court of the United States, District of New Jersey, a petition for a Writ of Habeas Corpus, and that on said day, the Honorable Edward T. Green, United States Judge for said district, sitting in said Circuit Court, considered said petition, and refused to grant said writ, because, in his opinion, it appeared from the petition that the petitioner was not entitled to the same.

An appeal was thereupon taken and allowed, and a citation was issued by said Court and served upon said appellee for his appearance before the Supreme Court of the United States on the fourteenth day of June, A. D., 1895.

The record of the appeal was filed with the Clerk of this Court, and the case is No. 650 on the docket for October Term, 1895.

The appellant claims in said petition for a Writ of Habeas Corpus, so filed as aforesaid, that the said indictment does

not charge him with crime of murder of the first degree, and he therefore maintains and insists that, under said indictment, he has been illegally and unlawfully convicted of an offense for which he was not indicted, in violation of the Constitution of the United States, and the Constitution of the State of New Jersey. This is a case of public importance, and therefore, on behalf of the appellee, I move to have the cause advanced on the list, so that an early day may be fixed for argument.

ELVIN W. CRANE,

Attorney for the Appellee and Prosecutor of the Pleas.

NOV 9 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 650.

HENRY KOHL, PLAINTIFF AND APPELLANT,

vs.

HERMAN LEHLBACH, SHERIFF, ETC., DEFENDANT AND APPELLEE.

ON APPEAL FROM UNITED STATES CIRCUIT COURT, DISTRICT OF NEW JERSEY.

ANSWER TO MOTION TO ADVANCE.

THOMAS S. HENRY,
ARTHUR ENGLISH,
Of Counsel for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

No. 650.

HENRY KOHL, PLAINTIFF AND APPELLANT,

vs.

HERMAN LEHLBACH, SHERIFF, ETC., DEFENDANT AND APPELLEE.

ON APPEAL FROM UNITED STATES CIRCUIT COURT, DISTRICT OF NEW JERSEY.

ANSWER TO MOTION TO ADVANCE.

In answer to the motion to advance the above-entitled cause, the appellant, Henry Kohl, respectfully begs this honorable Court that not less than six weeks' time be granted within which to prepare argument in said cause.

To sustain this request appellant humbly states that the appeal in this cause is not taken for delay, but because appellant has been deprived of the rights and remedies guaranteed him by the constitution of the State of New Jersey and the Constitution of the United States of America, and

the questions involved are of great importance and require careful examination and much labor to master.

In this case appellant was indicted for a crime, to wit, the common-law crime of murder, and on a plea of not guilty was convicted by a jury of the statutory crime of murder in the first degree.

On February 21, 1895, appellant was sentenced by the court of oyer and terminer of the county of Essex, State of New Jersey, to be hanged.

For various errors committed during said trial to which exception was taken appellant obtained a writ of error from the supreme court of the State of New Jersey, directed to the trial court, the said court of Oyer and Terminer; that appellant's attorney, on April 6, 1895, duly presented said writ of error to said trial court in open court, but the judge thereof refused to allow said writ and instructed the clerk not to furnish appellant's attorney with a copy of the record and proceeding in said cause.

Appellant had also applied to the chancellor of the court of chancery of the State of New Jersey for a writ of error. This being denied, appellant took an appeal to the court of errors and appeals, in which court appeals from said court of chancery are reviewable.

Notwithstanding said appeal from the court of chancery was pending undetermined in said court of errors and appeals, the sheriff of the county of Essex, by virtue of the judgment and sentence of said court of Oyer and Terminer aforesaid, made preparations to carry out said sentence of death and execute appellant on the 24th day of May, 1895.

Failing in all efforts to obtain a hearing by the higher courts of the State of New Jersey, as guaranteed by the constitution and laws of that State, appellant applied to the United States circuit court for the district of New Jersey for a writ of *habeas corpus*, and, on the denial of this, appellant prayed for an appeal to the Supreme Court of the United

States, which appeal was duly allowed on May 16, 1895, by the Honorable Edw. T. Green, judge.

In view of the above and the legal questions involved, and the necessity for thorough preparation thereon, your appellant humbly begs that his prayer for time in which to prepare argument be granted.

Respectfully submitted.

THOMAS S. HENRY,
ARTHUR ENGLISH,
Of Counsel for Appellant.

FILED.
DEC 9 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895

No. 650.

HENRY KOHL, APPELLANT,

vs.

HERMAN LEHLBACK, SHERIFF OF ESSEX COUNTY, NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

THOMAS S. HENRY,
ARTHUR ENGLISH,
Of Counsel for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895

No. 650.

HENRY KOHL, APPELLANT,

vs.

HERMAN LEHLBACK, SHERIFF OF ESSEX COUNTY, NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

The record in this cause shows that in the month of December, 1894, Henry Kohl, born a citizen of the city of Newark, State of New Jersey and United States of America, was indicted for murder by the grand jury for the county of Essex, State aforesaid; that said Kohl pleaded not guilty to said indictment; that on or about the 14th day of January, 1895, said Kohl, after a motion to quash said indictment had been denied, was placed on trial; that among the jurors before whom said Kohl was tried was one George Ader, who was not and never had been a citizen of the United States; that on January 25, 1895, said jury rendered a verdict against said Kohl of murder in the first degree; that on the 12th day of February said Kohl, by attorney, made an application for a new trial, which was de-

nied February 14, 1895; that on the 21st day of February, 1895, by virtue of the verdict of said jury, as aforesaid, the said Henry Kohl was by the judge of the said court of oyer and terminer sentenced to be hanged on the 21st day of March, 1895. On the 27th day of February, 1895, the said Henry Kohl, by attorney, made an application to the chancellor of the State of New Jersey for a writ of error, directed to said court of oyer and terminer, to review the errors of law committed by said court in said cause. Said application, after argument, was denied, and an appeal was taken to the court of errors and appeals of said State of New Jersey. On the 6th day of April, 1895, said Henry Kohl, by his attorney, appeared in said court of oyer and terminer for the county of Essex, State aforesaid, and in open court and in the presence of the prosecutor of the pleas of said county did present a writ of error signed by the clerk of the supreme court of the State of New Jersey, sealed with the seal of said court, and directed to the said court of oyer and terminer; that the judge of the court of oyer and terminer refused to obey said writ, but permitted it to be filed with the clerk of the court; that said presiding judge of the said court of oyer and terminer did instruct the clerk of Essex county, who is also the clerk of said court of oyer and terminer, not to furnish attorney for the said Henry Kohl with a copy of the record and proceedings had in said cause; that the supreme court of the State of New Jersey refused the prisoner, Henry Kohl, a stay of execution.

On May 16, 1895, the said Henry Kohl applied to the United States circuit court for the district of New Jersey for a writ of *habeas corpus*, alleging in his application that he was unlawfully imprisoned, detained, and confined in jail and restrained of his liberty in the city of Newark, county of Essex, and State of New Jersey; that said confinement was under and by virtue of a judgment and sentence of the court of oyer and terminer of said county and State, and

that the sheriff of said county had threatened to and was about to execute a sentence of death upon said Kohl on the 16th day of May, 1895, to which time the said Kohl had been reprieved. The application of the said Kohl for the writ of *habeas corpus*, which is part of the record in this cause, was denied by the Honorable Edward T. Green, judge of said United States circuit court. From this denial the said Henry Kohl took an appeal to the United States Supreme Court, which appeal was duly allowed on the 16th day of May, 1895, by the said Edward T. Green, judge, and the sheriff of the county of Essex, State aforesaid, was cited to appear at the Supreme Court of the United States, in the city of Washington, D. C., on the 14th day of June, 1895.

ARGUMENT.

The attention of the Court is called to the fact that the appellee has not denied any of the statements of fact contained in the petition for writ of *habeas corpus* and therefore admits their truth.

The questions to be determined in this case are:

First, the jurisdiction of the United States courts to consider the constitutional rights claimed by appellant on a writ of *habeas corpus*.

Second, whether the proceedings by the State court, to wit, the trial by a jury composed of eleven citizens and one alien, the denial of a writ of error, and the denial of a trial by due process of law were within and in contravention of the fourteenth amendment to the Constitution of the United States.

It has become established law through the numerous decisions rendered by this Court that the United States circuit court cannot release a prisoner held in confinement by a State court having jurisdiction on the ground of irregularities during the trial. This position was fully laid down in

the case of *In re* Wood, 140 U. S., p. 278, and *In re* Shibuya Jugiro, *id.*, 291. Both these cases and numerous others mentioned in those decisions came to this Court by appeal from the United States circuit court, said appeal being taken from the denial by that court of a writ of *habeas corpus*, the application for which was based on the denial of certain alleged rights by the State court having jurisdiction of the cause.

In all these cases this Court has held that a writ of *habeas corpus* cannot be used as a writ of error to review mere error in the proceedings by virtue of which a party is imprisoned.

The case now under consideration differs from the cases mentioned in a very important particular, although it comes to this Court by the same procedure. In the case under consideration the appellant, Kohl, was denied the equal protection of the laws of the State of New Jersey, contrary to the fourteenth amendment to the Constitution of the United States. This abridgment of appellant's rights within the meaning of said amendment consisted in his being deprived of certain rights which are guaranteed by the constitution and laws of the State of New Jersey.

The record shows appellant was tried by eleven citizens and one alien.

The Revised Statutes of the United States, after conferring power on the Supreme, circuit, and district courts of the United States to issue the writ of *habeas corpus* (see sections 751 and 752), provide in section 753 that—

> "The writ of *habeas corpus* shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, * * * or is in custody in violation of the Constitution or of the law or treaty of the United States." * * *

This provision gives this Court full power to inquire into the reasons for the custody of one held by the judgment of a State court, provided that he has been deprived of a constitutional right.

The Court is referred to the whole case of Hans Neilson, 131 U. S., 176. In that case the Court, among other things, said:

"It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*."

The Court then cited authorities, to which it is again referred.

See also *Ex parte* Virginia, 100 U. S., 339.
Virginia *vs.* Rives, 100 U. S., 313.

In *Ex parte* Siebold (100 U. S., 371) this Court said:

"The only ground on which this Court or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void."

In the case under consideration the judge who pronounced the sentence of death against appellant Kohl had no jurisdiction so to do, for the verdict which had been rendered was void, and without a valid verdict the judge was powerless to act. He could no more pronounce sentence and judgment on that verdict than if no trial had taken place. An illegal jury was no jury, and was without power to render any verdict in the case. Its action was not only voidable, but void.

This fact brings this case within those mentioned, wherein this Court has power to give relief.

In the case under consideration the appellant Kohl has been deprived, among other rights, of the most sacred right

known to the laws of this country, to wit, a trial by twelve of his countrymen.

The application for writ of *habeas corpus* to the United States circuit court was the only procedure left open to the appellant in this case. He had been deprived of the privilege of a writ of error, and therefore did not obtain a final judgment which could be brought to this Court by a writ of error. In view of this, this Court has the power and jurisdiction to pass upon the question as to whether the appellant has been denied a right under the fourteenth amendment. Were this not so, the prisoner would be without any remedy and the amendment would be of no value to him.

Mr. Justice Field, concurring with the opinion of this Court in the case of Bartemeyer *vs.* Iowa (18 Wallace, p. 129), speaking of the fourteenth amendment to the Constitution, said:

"The amendment was not, as held in the opinion of the majority, primarily intended to confer citizenship on the negro race. It had a much broader purpose. It was intended to justify legislation extending the protection of the National Government over the common rights of all citizens of the United States, and thus obviate objections to the legislation adopted for the protection of the emancipated race. It was intended to make it possible for all persons, which necessarily included those of every race and color, to live in peace and security wherever the jurisdiction of the nation reached. It therefore recognized, if it did not create, a national citizenship, and made all persons citizens except those who preferred to remain under the protection of a foreign government, and declared that their privileges and immunities, which embraced the fundamental rights belonging to citizens of all free governments, should not be abridged by any State. This national citizenship is primary and not secondary. It clothes its possessor, or would do so if not shorn of its efficiency by construction, with the right, when his privileges or immunities are invaded by partial and discriminating legislation, to appeal from his State to his nation, and gives him the assurance that for his protection he can invoke the whole power of the Government."

This is a masterly and correct exposition of the protection which this amendment confers upon the humblest citizen of this country, and it would be a mere mockery were the great writ of *habeas corpus* to be declared insufficient upon which to examine whether the invoker of it had been deprived of a constitutional right or not. It is true that for mere errors of law a writ of error alone can enable the appellate court to go into the questions of error in procedure in the trial of a cause; but where, through the arbitrary and unfair action of those administering the law, a prisoner is deprived of the right of a final judgment, it is the duty of a court obtaining jurisdiction by an application for a writ of *habeas corpus* to inquire into the reason for the applicant's detention, even though that detention be by virtue of the judgment of a State court having jurisdiction of the party and the crime. Because a State court has jurisdiction it does not necessarily follow that it has protected a defendant before its accusation with the rights extended to him by the Federal Constitution; and if he be precluded when deprived of those rights from appealing to the writ of *habeas corpus* and the courts, which are organized to interpret the Constitution, to what shall he appeal? He cannot take a writ of error from an inferior court, and he cannot take a writ of error from a superior court which has never passed upon the case. In the denial of this right of review alone is he deprived of the equal protection of the law. But in the case under consideration the prisoner was convicted by a jury composed of eleven of his countrymen and one alien, and in this, as an alien is not a juror, he was tried by a jury of but eleven men.

This case is in nowise like that of Bergemann *vs.* Backer (157 United States, p. 655), which came here from the State of New Jersey by the same procedure, but is totally unlike it, and the decision rendered by this Court in that case will not apply to the case under consideration.

Neither is it like Andrews *vs.* Swartz (156 U. S., 272).

The essence of a trial by jury consists of two things: First, the jury must be selected from the countrymen of the accused.

See 1st vol. Coke on Lyttleton, sec. 193, Lib. 2, note 125 A, 125 B, 1st Am., 16th English edition.

See Hargrave's Note, No. 191, same section and liber; also note 283, sec. 234, Liber 2, 157 A.

Butler's Note, 232, secs. 464–5, Liber 3, 272 A.

Finlason's Reeve's Hist. Eng. Law, vol. III, p. 183.

Same note, vol. 5, page 309.

People *vs.* Powell, 87 Cal., 348, and citations therein.

Where juror is an alien, defendant does not waive by failure to challenge.

Hill *vs.* People, 16 Michigan, 351. (Read.)

Antoini Guykowski *vs.* The People, 1 Scammon (Ill.), 476. (Read.)

And especially where fact of incompetency unknown to him.

See Rice *vs.* State, 16 Ind., 298.

Hardy *vs.* Sprowle, 32 Me., 310.

Lord Coke, in his commentary on Lyttleton (sec. 234, Lib. 2, cap. 12, note 156 B), defines a principal challenge to a juror as one, if found true, "standeth sufficient of itself, without leaving anything to the conscience or discretion of the triors."

Of these challenges he places "*propter defectum*," for want or default, and gives aliens born as being thus defective.

From the above it is quite clear that at common law a juryman who was not a citizen was not a juryman at all, and that he vitiated a verdict in which he took part.

In State *vs.* Rockafeller (1 Halstead, 405) the supreme court of the State of New Jersey held that an indictment by a grand jury, one of which was not a freeholder, as di-

rected by statute, was a bill by but eleven jurors and void, and voidable by pleading.

Hawkins (vol. 2, 312) says:

"That if any one of the grand jury who find an indictment be within any one of the exceptions in the statutes, he vitiates the whole, though never so many unexceptional persons join with him in finding it."

If this be true of grand juries, how much more so is it true of a jury which has a man's life at its disposal?

The second thing necessary to make a trial by jury legal, and without which its action is void and not merely voidable, is the fact that it must be composed of twelve persons.

2 Hale's Pleas of the Crown, 161.

Coke on Lyttleton, 1 Am., from 16th Eng. ed., sec. 234, Lib. 2, 155 A.

Bryant *vs.* Russell, 1–2 Penn. N. J., 107; *id.*, p. 663.

Cooley's Const. Limitations, 5th edition, page 391, and cases cited.

Consent of prisoner to his trial by less than a full jury of twelve was a nullity and the conviction illegal.

Cansemi *vs.* The People, 18 N. Y., 129. (Read.)

It is hardly necessary to quote further authorities on these two propositions with relation to a legal jury, but the Court's attention is called to the authorities found in the dissenting opinion of Justices Gray and Shiras in Sparf and Hansen *vs.* The United States, 156 U. S., 110, where the history and jurisdiction of a jury is so exhaustively set forth.

Such was the trial by jury on May 20, 1774, when George III signed the regulation act (Pickering's British Statutes, vol. 30, p. 381) which caused the American colonies to rebel against Great Britain. It is peculiarly true, also, that this act, which was the immediate cause of the American Revolution, was an act which deprived the colony

of Massachusetts of the right to select juries in accordance with the custom which had existed there for time almost immemorable.

In 1776, on severing its connection with the Crown of Great Britain, the State of New Jersey adopted a constitution. By section 22 of this constitution the State solemnly declared that the—

"Inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal, forever."

The "trial by jury" mentioned in that constitution was the trial by twelve of the countrymen of the accused. No other trial by jury was known to the English speaking race, except in one particular case, which it is unnecessary to discuss at this time, as it is foreign to the case under consideration.

By the act of November 10, 1797 (Laws of New Jersey, 1797, p. 249), it was provided that all jurors should be citizens of the State; but a proviso was appended to this act, which read that no exception could be taken to a juror not a citizen after said juror had been sworn.

The above provision of 1797 still remains on the statute book of the State of New Jersey, and related to the jurors drawn to try the appellant in this case. The proviso in the act of 1797 was in violation of the Constitution of 1776, as it allowed a juror to render a verdict who was not a countryman of the person he tried. This proviso, however, only related and could only relate to a case where the non-citizenship of the juror was known to the persons having the right to except to his becoming one of his triors.

The constitution of the State of New Jersey, adopted in 1844, declares (art. 1, sec. 7) that "the right of trial by jury shall remain inviolate."

The above declaration as clearly wiped off the statute books of New Jersey the proviso prohibiting an exception

to a non-citizen juror after being sworn as if it had done so in expressed terms, although legally it never existed, as such legislation was contrary to the constitution of 1776; but certainly the constitution of 1844 destroyed any question as to the validity of that proviso.

In People *vs.* Powell, 87 Cal., 348, the supreme court of California construes words identical with this as referring to the right as it existed at common law.

Article 10, section 1, of the same constitution of 1844 provides that the common law and statute laws now in force shall remain in force until they expire or are altered or repealed. This last-mentioned article, taken in connection with that relating to the trial by jury, should set at rest any idea that a person not a citizen could be a valid juror, or that a verdict rendered by twelve men, one of whom was not a citizen, could be other than void, whether excepted to or not; whether known or unknown.

In the case of Scudder *vs.* Trenton, 1 Saxton, N. J., equity, 695–722, Chancellor Vroom (p. 722), in speaking of the right of the State to take property for public use as being one which could not be made the subject-matter of a trial by jury, said:

"It is unnecessary to inquire into the origin of the trial by jury or how far and to what particular case it has been extended in England. How it was exercised in the colony at the time of adopting the Constitution is a more important inquiry. It was a part of the common law, so far as that had been adopted or acted on here at that time. So far it was to remain the law of the State until altered, but that part of it relating to trial by jury was to remain without repeal. It was to remain as it had theretofore been in use."

Continuing further (p. 723), the chancellor shows what the law was in the colony with relation to juries by referring to an act passed by the Assembly of West Jersey, at Burlington, in 1681, as follows:

"And it is remarkable that the assembly at the same session passed a solemn act, general and fundamental in its character and in many respects corresponding with a bill of rights, in which they declare:

"'That no proprietor, freeholder, or inhabitant of the province shall be deprived or condemned of life, limb, liberty, estate, property, or any way hurt in his or their privileges, freedoms, or franchises, upon any account whatever, without a due trial and judgment, passed by twelve good and lawful men of the neighborhood, first had, or according to the laws of England.'"

In the same case (p. 727) the chancellor said:

"The legislature, in this State, is not omnipotent, as was the British Parliament. It is subordinate to the constitution, and if it transcend its power its acts are void, and it is the duty of the judiciary to declare them so."

The 14th amendment of the United States Constitution is a part of the constitution of every State in this Union and becomes a part of every State as it is admitted. All legislative acts or acts of the State agents, whether judicial or executive, which violate the provisions of that amendment are void.

In an opinion rendered to the house of representatives (Opinions of Justices, 41 N. H., 550) the supreme court declared that the Legislature could not authorize a trial by a jury composed of less than twelve.

In the case under consideration the appellant Kohl was tried while the following provision of the Revised Statutes of New Jersey of 1874 was in force. It is printed on page 532 of the statutes, entitled "1709–1877":

"That every person summoned as a grand juror in any court of this State, and every petit juror returned for the trial of any action or suit of a civil or criminal nature, shall be a citizen of this State and resident within the county from which he shall be taken, and above the age of 21 and under the age of 65 years; and if any person who is not so qualified shall be summoned as a grand juror or as a

juror in the trial of any such action in any of the courts of this State, or if any person shall be summoned as a petit juror at any stated term of any court of this State who has served as such at any of the three stated terms next preceding that to which he may be summoned, it shall be good cause of challenge to any such juror, who shall be discharged upon such challenge being verified according to law or on his own oath or affirmation in support thereof, provided that no exception to any such juror on account of his citizenship or age or any other legal disability shall be allowed after he has been sworn or affirmed."

While the proviso in the above statutes, as has been heretofore shown, is clearly in violation of the constitutional declaration that the trial by jury shall remain inviolate, yet in the case under consideration it is not necessary to depend alone on that, or, indeed, upon that at all, as in the case of this appellant the juror Samuel Ader was placed upon said jury without the appellant having knowledge that he was not a citizen, and it was not due to any lack of diligence on the part of this appellant that he did not discover said fact, as he was not enabled by reason of the short time within which he had knowledge of the names of those who constituted the panel from which the jury was drawn to learn whether said Ader was or was not a citizen. Because of this ignorance of fact—which ignorance should not be taken against this appellant and would not be taken against him by any court in a civil case, much less a case in which his life was involved—he has been denied a trial in accordance with the constitutional provision of his State, and in that has been denied the equal protection of its laws.

In the case of Mima Queen and Child *vs.* Hepburn (7 Cranch, 290) a juror was drawn as a talesman and stated to be an inhabitant of Alexandria—not of Washington, where the case was tried. This point being raised before this Court among others, Judge Marshall held that the objection should have been made before the juror was sworn, and it was too late to raise it afterwards. It is noticeable, however, that

that case was not one in which a person was on trial for his life, nor was it one in which the citizenship of the juror or residence of the juror was unknown, but it was known and not objected to; hence it was held to be too late on the part of him who raised the point.

In the case of Lafayette Plank Road Company *vs.* New Albany and Salem Railroad Company (13th Indiana, 90) the supreme court of Indiana, speaking of the qualification of the juror, said:

"We are not prepared to say that the new trial might not have been granted for the first cause. The fact that the juror was not a householder was a good cause of challenge, but the challenge was not made, nor was the juror interrogated as to his qualifications. Had the defendants known the juror was incompetent at the trial, their failure to raise the objection would have been a waiver of it. It appears that they were ignorant of the fact. Whether their neglect to make inquiry as to the fact before accepting the juror should be held a waiver we need not here decide, as we are clear that the new trial was properly granted for the second cause."

The necessity in a trial by jury for every member of the jury to be a citizen is beyond question, and in the State of New Jersey, with its constitutional provisions, a trial by jury cannot be held legal where every member of it is not a citizen of the State. This qualification is not one which could be considered as merely one that the law directs, but it is a fundamental ingredient which cannot be departed from and without which no jury is legal or can render a valid verdict.

In Hill *vs.* People, 16 Mich., 356, the supreme court of Michigan held that a prisoner did not waive right to challenge by neglecting challenge alien and the verdict was void.

Any person held within the State jail by reason of the verdict rendered by a jury one of which is not a citizen is restrained of his liberty in violation of all rights and the constitution both of the State of New Jersey and of the

United States, and, being held and confined without a legal sentence, it is the duty of the United States circuit court to have ordered the release of one so held and confined. Said court having refused so to do, and the facts as shown in the record in this case being brought to the attention of this Court in connection with the appeal to review the action of the court below, it is clearly within the jurisdiction of this Court to order the release of the prisoner. This confinement is unauthorized because the result of a verdict which is void, and the power of this Court under the writ of *habeas corpus* is fully equal to releasing this prisoner without it being necessary for a writ of error to bring the proceedings of the trial court to be re-examined here. This is made more clear by the fact that the record of the trial court would not show the fact that this juror, Ader, was not a citizen of the United States, and therefore the writ of *habeas corpus* is the only writ by which this prisoner could invoke the protection of the Constitution of the United States and obtain his release from an illegal confinement and prevent his life being taken by a tribunal before which he had not received a fair trial or any trial at all. His trial with eleven citizens and one alien on the jury was not a trial at all, but it was a proceeding beyond the pale of the law, not recognized by any jurisprudence known to this country. For this reason this Court should reverse the decision of the United States circuit court for the district of New Jersey and order the discharge of this prisoner from the custody of the sheriff of the county of Essex, in said State.

Denial of Writ of Error.

The accused in this case has been denied the equal protection of the laws of New Jersey, in violation of the fourteenth amendment, in that he was deprived of the right of a writ of error which is given to all persons where errors of law have been made by the trial court.

By the act of 1795, found in the first volume Revision of 1874, page 283, it is provided:

"Writs of error in all criminal cases not punishable with death shall be considered as writs of right, and issue of course; and in criminal cases punishable with death, writs of error shall be considered writs of grace and shall not issue but by order of the chancellor for the time being, made upon motion or petition, notice whereof shall always be given to the attorney general or the prosecutor for the State."

First volume Revised Statutes, page 209, gives the act approved March 12, 1878, as follows:

"That the eighty-third section of the act entitled 'An act regulating proceedings in criminal cases' (Revision), approved March twenty-seventh, eighteen hundred and seventy-four, which is in these words, viz. (*vide* Rev., p. 283), be, and the same is hereby, amended, and it is hereby enacted as follows, viz:

"Writs of error in all criminal cases shall be considered as writs of right, and issue of course; but in criminal cases punishable with death, writs of error shall be issued out of and returnable to the court of errors and appeals alone, and shall be heard and determined at the term of said court next after the judgment of the court below, unless for good reasons the court of errors and appeals shall continue the cause to any subsequent term."

In the case of Entries *vs.* State (18 Vroom, N. J., 140) the court of errors and appeals, passing on an application for a writ of error under the last above-mentioned act, said:

"This writ of error must be dismissed. It is a writ issuing out of this court, directed to the court of over and terminer in a criminal case, and it has been repeatedly held by this court that such a proceeding is inefficacious and void. It is one of the inherent prerogative rights of the supreme court originally possessed by it, and established in it by the constitution of the State, to supervise all the errors and irregularities of the inferior tribunals, which when such errors have occurred the remedy, in the first instance,

must be sought in that tribunal. By the constitution the jurisdiction of this court, as a court of last resort, was not enlarged, except that in the third clause of section 5 of article VI it is declared that 'final judgments in any circuit court may be brought by writ of error into the supreme court or directly into the court of errors and appeals.'

"This appears to be the only instance in which the makers of the constitution manifest an intention to diminish in any degree, in favor of this court, the superintendency of the supreme court, and in view of this, during the existence of a statute authorizing a procedure similar to the present one, more than one of such writs of error going from this court to the oyer were declared here to be mere nullities."

See also Anonymous, 1 Harrison, 271.

The above decision in Entries *vs.* State does not destroy that part of the act of 1874, *supra*, giving the chancellor authority to issue the writ, nor does it destroy that part of the act of 1878, *supra*, which makes a writ of error a writ of right.

The result of this is that the law relating to writs of error is: that the writ is a writ of right; that both the chancellor and the supreme court can issue it; and that it is not discretionary with either, but mandatory upon both.

By the act of 1881, Revision, second volume, page 210, it is provided:

"SEC. 1. That in case a writ of error shall be brought to remove any judgment rendered in any criminal action or proceeding in any court of this State and such writ of error shall be presented to such court, the said writ of error shall have the effect of staying all proceedings upon the said judgment and upon the sentence which the court or any judge thereof may have pronounced against the person or persons obtaining and prosecuting the said writ of error pending and during the prosecution of such writ of error."

"SEC. 2. That pending the prosecution of such writ of error the court in which such judgment shall have been rendered may, if deemed necessary, require the party prosecuting the same to give bail during the prosecution of such

writ of error in such sum and with such conditions as the court, or any judge thereof, in which the said conviction was had, or any justice of the supreme court, may deem reasonable; and it shall be the duty of the said court and of the said judges to admit such persons to bail when application is made for the same and proper and sufficient bail is offered: *Provided*, That this section of this act shall not apply to capital cases."

The proviso to the second section shows that the intention of the legislature was that writs of error should act as a stay in all cases, but that in capital cases the accused should not be admitted to bail.

By an act passed May 9, 1894, it is provided (N. J. Laws, page 246)—

"That the entire record of the proceedings had upon the trial of any criminal cause may be returned by the plaintiff in error therein with the writ of error, and when so returned shall form a part thereof, and on the argument such entire record shall be considered and adjudged by the appellate court, and if it appear from such record that the plaintiff in error on the trial below suffered manifest wrong or injury, whether by rejection of testimony or in the charge made to the jury or in the denial of any matter by such court which was a matter of discretion or upon the evidence adduced upon the trial, the appellate court shall remedy such wrong or injury and give judgment accordingly and order a new trial."

Under the 114th section of the chancery act, Revised Statutes, first volume, page —, it is provided that—

"All persons aggrieved by an order or decree of the court of chancery may appeal from the same or any part thereof to the court of errors and appeals, and all appeals, except from final decrees, shall be made within forty days after filing the order or decree appealed from, and all appeals from final decrees in said court shall be made within three years after making such decree."

THE INDICTMENT.

The judge of oyer and terminer did not have jurisdiction to pronounce sentence in that the indictment upon which the proceedings were based was void and all proceedings void and which prevented him from obtaining power to pronounce judgment.

This indictment was defective and void in that it charges two or three different kinds of murder at the same time.

1 Chitty Com. Law., 251.

2 East. P. C., 515.

The indictment consists of three counts: The first simply charges murder generally in the statutory language: the second charges that death resulted from an assault upon the head with a stone: the third, that the accused threw and pushed the deceased into a stream of water, in consequence of which the deceased was choked, suffocated, and drowned.

It will be observed that two or three different kinds of murder are set out in the indictment at the same time.

The first count is also fatally defective, because the alleged offense is stated only in the statutory language.

U. S. *vs.* Carl, 105 U. S., 611.

In the dissenting opinion of Justice Field in Evans *vs.* U. S., 153, 598, he says:

"A mere statement of the offense in the words of the statute, without a statement of the accompanying facts and circumstances essential to constitute a specified offense, will be insufficient."

See also O'Neil *vs.* Vermont, 144 U. S., 324.

Subdivision 2:

The other counts are faulty, in that they fail to charge that the offense was done deliberately and with premeditation.

State *vs.* Shildon, 64 Iowa, 387.

State *vs.* MacCormick, 27 Iowa, 402.

"All proceedings of inferior courts which conclusively affect the rights or property of persons ought to be subject to the revision or correction of a higher tribunal."

6 Johns. (N. Y.), p. 389.

"The fourteenth amendment was intended to protect the privileges and immunities of every citizen."

People *vs.* Williams, 35 Hun., 523.

"Due process of law is also established for the protection and enforcement of private rights."

Pennoyer *vs.* Neff, 95 U. S., 714.

The attention of the Court is directed to the case of Murray's Lessee *vs.* Hoboken Land and Improvement Company (18 Howard, 272). In that case Judge Curtis, as the organ of this Court, speaking of the words "due process of law," found in the fifth amendment to the Constitution, said:

"The article is a restraint on the legislative as well as on the executive and judicial powers of the Government and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will.

"To what principles, then, are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This was said by this Court in 1855, before the adoption of the fourteenth amendment, in which are found the same words as those of which the Court was then speaking. The fifth amendment only applied to Congress and the Federal courts. The fourteenth amendment applies to the legislatures and courts of the States. The principles of construc-

tion and interpretation laid down by this Court then in considering the words of the fifth amendment are the proper interpretations at this day for the words found in the fourteenth amendment.

In the case of Hertado *vs.* The People of California (110 U. S., 516) Mr. Justice Matthews, delivering the opinion of the Court, among other things, speaking of the 14th amendment, said:

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act legislative in form that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster in his familiar definition, 'the general law, the law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial,' so that 'every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude; and the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

Judge Harlan, in a dissenting opinion in the same case, gives a most exhaustive review of the phrase "due process of law," and the Court is requested to refer to the whole of this dissenting opinion, as its reason and authorities do not appear to be in conflict with the reasoning in the majority opinion, though its conclusion is the reverse.

In view of all that has been said, your appellant humbly prays that this honorable Court will remand the case with directions to the United States circuit court for the district of New Jersey to issue a *habeas corpus* as prayed for and proceed thereon according to law.

Respectfully submitted.

THOMAS S. HENRY,
ARTHUR ENGLISH,
Of Counsel for Appellant.

FILED.
DEC 7 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

NO. 650.

HENRY KOHL, APPELLANT,

vs.

HERMAN LEHLBACH, SHERIFF OF ESSEX COUNTY, NEW JERSEY, APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Brief of Elvin W. Crane,

Attorney for Appellee and Prosecutor of the Pleas.

The W. H. Shurts Co., Printers, 874-876 Broad St., Newark, N. J.

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HERMAN LEHLBACH, SHERIFF OF ESSEX COUNTY, NEW JERSEY, APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Brief of Elvin W. Crane, Attorney for Appellee and Prosecutor of the Pleas.

On the sixth day of December, A. D., 1894, the appellant was indicted by the Grand Jury of Essex County, in the State of New Jersey, for the crime of murder, committed in the city of Newark, in said county, on the sixteenth day of June, A. D., 1894. On the eleventh day of December, A. D., 1894, before the Court of Oyer and Terminer, held at the city of Newark, in and for said county of Essex, the appellant entered a plea of not guilty to said indictment,

and the seventh day of January, A. D., 1895, was fixed for the trial of said indictment, and on said last mentioned day the trial was postponed to the fourteenth day of January, A. D., 1895. On said last mentioned day, and before the commencement of said trial, the appellant's counsel moved before said Court to quash the indictment, which motion was then and there denied, and an exception was taken and allowed to the ruling of said Court.

The following is a true copy of the indictment, viz.:

ESSEX OYER AND TERMINER AND GENERAL JAIL DELIVERY.

September Term, A. D., 1895.

Essex County, to-wit: The Grand Jurors of the State of New Jersey, in and for the body of the county of Essex, upon their oath, present that Henry Kohl, late of the city of Newark, in the county of Essex aforesaid, on the sixteenth day of June, in the year of our Lord one thousand eight hundred and ninety-four, with force and arms at the city aforesaid, in the county aforesaid, and within the jurisdiction of this Court, in and upon one Joseph Preinel, in the peace of God and of this State then and there being, did make a felonious assault; and him, the said Joseph Preinel, then and there wilfully, feloniously and of his malice aforethought did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And the Grand Jurors of the State of New Jersey, in and for the body of the county of Essex aforesaid, upon their oath do further present that the said Henry Kohl, late of the city of Newark, in the county of Essex aforesaid, on the sixteenth day of June, in the year of our Lord one thousand eight hundred and ninety-four, with force and arms at the city aforesaid in the county aforesaid, and within the jurisdiction of this Court, in and upon one Joseph Preinel, in the peace of God and of this State, then and there being,

feloniously, wilfully and of his malice aforethought, did make an assault; and that the said Henry Kohl, a certain stone of no value which he, the said Henry Kohl, in his hands then and there had and held in and upon the head of him, the said Joseph Preinel, then and there feloniously, wilfully and of his malice aforethought did cast and throw, and that he, the said Henry Kohl, with the stone aforesaid, so as aforesaid, cast and thrown, the aforesaid Joseph Preinel in and upon the head of him, the said Joseph Preinel, then and there feloniously, wilfully and of his malice aforethought, did strike, penetrate and wound, giving to the said Joseph Preinel by the casting and throwing of the stone aforesaid in and upon the head of him, the said Joseph Preinel, one mortal wound, of which said mortal wound the said Joseph Preinel then and there instantly died. And so the Grand Jurors for the State of New Jersey, in and for the body of the county of Essex aforesaid, upon their oath aforesaid say that the said Henry Kohl, him, the said Joseph Preinel, in manner and form aforesaid, feloniously, wilfully and with his malice aforethought, did kill and murder contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex aforesaid upon their oath, do further present that the said Henry Kohl, late of the City of Newark, in the County of Essex aforesaid, on the sixteenth day of June, in the year of our Lord one thousand eight hundred and ninety-four, with force and arms at the City aforesaid, in the County aforesaid and within the jurisdiction of this Court, in and upon one, Joseph Preinel feloniously, wilfully and of his malice aforethought, did make an assault; and that the said Henry Kohl, then and there feloniously, wilfully and of his malice aforethought, did take the said Joseph Preinel into both the hands of him, the said Henry Kohl and did then and there feloniously, wilfully and of his malice aforethought cast, throw and push the said Joseph Preinel into a certain

stream of water there situate wherein there was a great quantity of water; by means of which said casting, throwing and pushing of the said Joseph Preinel into the stream of water aforesaid by the said Henry Kohl in form aforesaid, he, the said Joseph Preinel in the stream of water aforesaid, with the water aforesaid, was then and there choked, suffocated and drowned; of which said choking, suffocation and drowning, he, the said Joseph Preinel then and there instantly died. And so the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex aforesaid, upon their oath aforesaid, do say that the said Henry Kohl in manner and form aforesaid, him, the said Joseph Preinel feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

ELVIN W. CRANE,
Prosecutor of the Pleas.

The appellant was then tried before said Court and a jury, and found guilty of murder of the first degree, and was, on the twenty-first day of February, A. D., 1895, sentenced by said Court to be hanged on the twenty-first day of March, A. D., 1895.

The first claim of the appellant made to support his application for a writ of Habeas Corpus as appears by his petition filed in this cause is that he "was indicted for an offense which does not exist under the laws of New Jersey, the laws of New Jersey recognizing no such crime as murder. The 68th section of the Crimes Act (Revision of the laws of New Jersey) has altered the common law crime of murder by dividing it into two degrees—murder in the first degree and murder in the second degree."

"That the indictment against him should have been laid under the statute and not under the common law, and should have been drawn with reference to the statutory crime not the statutory form; that the said indictment is not drawn

with reference to the statutory definition, but with reference to the common law definition, which has been changed by the laws of New Jersey and that under the rules of pleadings the statutory crime should have been set out distinctly in the indictment."

"That the said indictment does not charge him with the crime of murder of the first degree, and he maintains and asserts that under said indictment he has been illegally and unlawfully convicted of an offence for which he was not indicted, and in violation of the constitution of the United States and the constitution of the State of New Jersey."

The indictment contains three counts, the first of which is based upon the 45th section of the New Jersey Criminal Procedure Act which is as follows, viz: "In any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did wilfully, feloniously and of his malice aforethought kill and murder the deceased, and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased." Rev. Sts. of N. J., p. 275, sec. 45. The second and third counts set forth the manner and means by which the deceased came to his death.

The 68th section of the New Jersey Crimes Act declares that, "All murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in perpetrating, or attempting to perpetrate, any arson, rape, sodomy, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree, and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree."—Rev. Stat. of N. J., p. 239, sec. 68.

In the case of Graves *vs.* The State of New Jersey, 45 N. J. L. (16 Vroom), p. 203, the Supreme Court held that "an indictment charging murder in the language of the 45th section of the Criminal Procedure Act (above referred to) is constitutional and legal," and the Court further declared that "The effect of the statute in question (section 68, above referred to) according to the entirely-settled construction, was neither to add any case to, nor take any case from, the class of crimes which, at common law, was denominated murder, for every act that was murder at common law is still murder in this State. What this statute effected was to distribute the offence into two classes for the sake of adjusting the punishment. Those facts that constituted murder in the second degree were all necessary parts and constituents of murder in the first degree, and the conviction of the lesser crime under the charge of the higher crime which embraced it was, upon well-known principles, entirely normal. The practice is consistent with scientific rules, and, at all events, has been too long established by usage and judicial recognitions to be now opened to impeachment. And it is manifest that this interpretation of the statute takes away from the objection to the late act, (Section 45, above referred to), which simplifies the formula of the charge of murder, on the ground of its alleged unconstitutionality, every semblance of plausibility, for the abbreviated statement which is authorized plainly informs the defendant of the nature and cause of the accusation. It does not interfere with the substance and pith of the pleading. What it effects is to strip it of its technical jargon and unmeaning circumstances. When, in its succinct accusation, it avers that the defendant 'did wilfully, feloniously and of his malice aforethought kill and murder the deceased,' its plain meaning is that the charge is of murder in the first degree, as that crime is defined by the laws of this State, and has the same effect as the old and verbose form of pleading in common use in this respect had possessed. The intention of the legislature is plain, to substitute a simple pleading for a cumbrous and useless one,

and such an amelioration of the law is, fortunately, not incompatible with the constitution."

This case was appealed to the Court of Errors and Appeals of the State of New Jersey (45, N. J. L., p. 358) and that Court held that,

"The legislature, in declaring what shall constitute murder of the first degree and what murder of the second, created no new crimes, but merely made a distinction, with a view to a difference in the punishment, between the most heinous and the less aggravated grades of the crime of murder. That which was murder at the common law was, after the statute, still murder here, but the most flagitious species was designated as the highest degree and visited with the extreme penalty, while all others were declared to constitute a lower class and to be punishable accordingly. When the legislature commendably simplifying the form of the indictment, provided that in charging the crime, it should not be necessary to set forth the manner in which or the means whereby the death was caused, but that it should be sufficient to charge that the defendant wilfully, feloniously and of his malice aforethought, killed and murdered the deceased, it merely provided that in a charge of murder, a crime well understood and defined in the law, it should be enough to charge the crime in language sufficient to designate it. It also provided that if the jury should find the accused guilty of murder, they should by their verdict say whether it was murder of the first or second degree, and that if the conviction was on confession, the Court should ascertain and fix the degree. The statute did not make murder of the first degree a separate and distinct crime from murder of the second, but murder of each grade, after the passage of the statute, continued to be, as it had theretofore been, the crime of murder. The indictment in the statutory form is for the crime of murder, without regard to the degree. Under such an indictment, the defendant is not only informed of the nature and cause of the accusation, but is apprised of what it is exactly. It is a charge of murder, and the cause the wilful and felonious killing by

him, of the deceased, of his malice aforethought. The offence for which he is called to answer is charged in the indictment. It is murder. According as he shall or shall not be proved to have committed the crime of murder, he will be convicted or acquitted; and if convicted, according as it shall be proved that he committed it under circumstances which characterize the one degree or the other, so it will be found or adjudged with a view to his punishment, and he will be punished accordingly."

"No right of the defendant was violated, nor any privilege of his disregarded or contravened by convicting him of murder of the first degree on an indictment which described the crime according to the statutory form."

The indictment in the Graves case contained but one count, and it is the same as the first count in the indictment in question.

The Supreme Court of N. J. in the case of Titus *v.* The State, 49 N. J. L. (20 Vroom 36), held that "in an indictment for murder, when the fact that the killing was in the commission of a rape, is relied on to make such killing murder in the first degree, a count in the general form authorized by the 45th section of the Criminal Procedure Act is sufficient."

The above decisions certainly uphold the form of the indictment used in this case, and declare that the indictment does charge the appellant with the crime of murder of the first degree, and that such a crime is known to and recognized by the laws of New Jersey.

By the laws of New Jersey the Court of Oyer and Terminer and General Jail Delivery has "cognizance of all crimes and offenses whatsoever, which, by law, are or shall be of an indictable or presentable nature, and which have been or shall be committed within the county for which such court shall be held." Rev. Stat. N. J., 272, Sec. 30. It is, therefore, quite clear that the Court of Oyer and Terminer had jurisdiction both of the offense charged and of the accused.

And this Court in the case of Bergemann *v.* Backer,

All Op. U. S. Sup. Ct. (May 15, 1895) No. 13, p. 739, declared that "where the State Court has jurisdiction of the offense charged, and of the accused, it is for that Court to determine whether the indictment sufficiently charges the crime of murder of the first degree." And also that "where the State Court has decided that the State statute making an indictment for murder sufficient which charges that the defendant wilfully, feloniously, and of his malice aforethought, killed and murdered, without charging the manner or means by which the death was caused, does not add to nor change the crime, as defined at common law, and that a conviction thereunder violates no right or privilege of the accused, this Court will not hold that the statute denies to the accused the equal protection of the laws or due process of law as prescribed by the Federal Constitution."

The appellant further alleges, in his petition, that he is illegally detained in prison "because he has been denied a review of the record and proceedings in his case pending appeal, which denial is in violation of the laws of New Jersey," and refers to the laws of 1878, p. 80; 1881, p. 88; 1894, p. 246. There is no appeal pending, it appears, by the petition filed in this case, that an application was made to the Chancellor of New Jersey for a writ of error, and it also appears that said application was denied.

Section 83 of the N. J. Criminal Procedure Act (Rev. Stat. of N. J., 1709-1877, p. 283) declares that "writs of error in all criminal cases not punishable with death, shall be considered as writs of right and issue of course; and in criminal cases punishable with death, writs of error shall be considered as writs of grace, and shall not issue but by order of the Chancellor for the time being, made upon motion or petition, notice whereof shall always be given to the Attorney General or the Prosecutor for the State."

But the appellant claims that the law of 1878, p. 80, which attempts to amend Sec. 83, above referred to, made Writs of Error, writs of right in all cases. The act in question is as follows, viz.: "Writs of error in all criminal cases shall be considered as writs of right and issue, of course:

but in criminal cases punishable with death, writs of error shall be issued out of and returnable to the Court of Errors and Appeals alone, and shall be heard and determined at the term of said Court next after the judgment of the court below, unless for good reasons the Court of Errors and Appeals shall continue the cause to any subsequent term."

Although the legislature by this act attempted to make all writs of error, in criminal cases, writs of right, it also declared that a writ issued in a capital case, should be issued out of and returnable to the Court of Errors and Appeals alone.

In the case of Entries *v.* The State (18 Vroom, N. J., p. 140), the Court of Errors said, "A writ of error will not go directly from the Court of Errors to the Oyer and Terminer," and that "The legislature cannot sanction such a proceeding, as it is one of the prerogatives of the Supreme Court to exercise, in the first instance jurisdiction in such cases." Therefore, the legislature has never provided a legal and constitutional way to have a capital case reviewed, on appeal, by the Supreme Court, except in the mode provided by section 83 of the Criminal Procedure Act, and in view of the decision in the Entries case, the Chancellor of the State of N. J. has the ~~sole~~ legal power to assume the exclusive right and authority to determine whether or not a writ of error should be allowed in a capital case.

The appellant further contends that he has taken an appeal under the law of 1881, p. 88, which is a supplement to the N. J. Crim. Pro. Act. The law is divided into two sections. The first section provides "That in case a writ of error shall be brought to remove any judgment rendered in any criminal action or proceeding, &c.," the writ shall have the effect of staying all proceedings upon the said judgment. The second section of the act does not apply to capital cases because it provides "that this section of this act shall not apply to capital cases," nor does the first section apply, unless a writ of error has first been obtained,—and the same observation may well be made with regard to the act of 1894, p. 246, which is also a supplement to the N. J. Crim.

Pro. Act, because that act simply provides "that the entire record of the proceedings had upon the trial of any criminal cause may be returned by the plaintiff in error therein with the writ of error, * * * * *; and if it appear from such record the plaintiff in error on the trial below suffered manifest wrong or injury, * * * the appellate court shall * * * * * order a new trial,"—no writ of error even having been granted to the appellant,—the above act does not apply to his case.

"An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review." "It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be proper:" and "whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself."

Kane *v.* Durston, 153 U. S. 684, 687.

"The refusal of the Courts of the State to grant the ac-
d a writ of error or to stay the execution of the sen-
constitutes no reason for the granting of a writ of
rpus by a court of the United States."

ergemann *v.* Backer. *supra*

that the questions raised, by the petition of the
it, are, according to the Federal cases thus far re-
to, State questions only and that they have been dis-
sed of by the appropriate State authorities, and that if
his contention is correct, "it is not the province of this

Court to interfere, and there is no basis for the suggestion of any violation of the Constitution of the United States; the denial of due process of law; or deprivation of any right, privilege, or immunity secured to him by the Constitution or laws of the United States."

Lambert *v.* Barrett, All Op. U. S. Sup. Ct. (May 15, 1895), No. 13, p. 745, 746, and other cases there cited.

Respectfully submitted,

ELVIN W. CRANE,
Attorney for the Appellee and
Prosecutor of the Pleas.